



May 16, 2000

Mr. George Cato  
Supervising Attorney  
Office of General Counsel  
Texas Department of Health  
1100 West 49<sup>th</sup> Street  
Austin, Texas 78756-3199

OR2000-1941

Dear Mr. Cato:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 135273.

The Texas Department of Health (the "department") received a request for information pertaining to an investigation of a report of abuse at Uvalde Memorial Hospital, a general hospital licensed by the department. The documents submitted to this office as responsive to the request consist of two reports; intake worksheets; complaint reports; a three-page "Call Narrative"; a two-page "Abuse/Neglect/ Exploitation Investigation Transmittal"; complaint tracking forms; a summary statement of deficiencies; HCFA forms 670, 562, 1537, 1539, and 2567; HFL form 50: pre-survey and survey information; and several letters responding to complaints.<sup>1</sup> One letter is addressed to the individual whom the requestor represents. The requestor refers to that letter in his request for the information, so that letter has been released. You inform us that the first report, titled "Abuse, Neglect, Exploitation Report of Contact" ("A/N/E report"), is a report generated pursuant to chapter 48 of the Human Resources Code "when a complaint of possible abuse or neglect of an elderly person is received by [the department]." You state that the second report, titled "Report of Contact," contains information "almost identical except for the concluding paragraph" as that found in the A/N/E report, and was "created for the purpose of documenting the state investigation performed by [the department] pursuant to state law."

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<sup>1</sup>We note that the request itself could be construed to seek only information specifically made subject to required public disclosure under section 241.051(e) of the Health and Safety Code; that is, the requestor acknowledges the department's position that some of the requested information may be confidential but insists on being provided section 241.051(e) information promptly. You state that none of the information you have submitted to this office falls within section 241.051(e). Therefore, we assume that you have released any section 241.051(e) information that exists.

You assert that portions of the responsive documents are made confidential by various statutes and the common law right to privacy under section 552.101 of the Government Code. Section 552.101 of the Government Code excepts from disclosure information that is made confidential by law, including information made confidential by other statutes. We have considered your arguments and have reviewed the submitted information.

You argue that section 241.051 of the Health and Safety Code prohibits the release of all of the submitted documents in their entirety. Chapter 241 of the Health and Safety Code governs licensing of hospitals. Section 241.051 authorizes the department to make any inspection, survey, or investigation that it considers necessary. Section 241.051 provides in pertinent part:

(d) All information and materials obtained or compiled by the department in connection with a complaint and investigation concerning a hospital are confidential and not subject to disclosure under Section 552.001 et seq., Government Code, and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to anyone other than the department or its employees or agents involved in the enforcement action except that this information may be disclosed to:

(1) persons involved with the department in the enforcement action against the hospital;

(2) the hospital that is the subject of the enforcement action, or the hospital's authorized representative;

(3) appropriate state or federal agencies that are authorized to inspect, survey, or investigate hospital services;

(4) law enforcement agencies; and

(5) persons engaged in bona fide research, if all individual-identifying and hospital-identifying information has been deleted.

(e) The following information is subject to disclosure in accordance with Section 552.001 et seq., Government Code:

(1) a notice of alleged violation against the hospital, which notice shall include the provisions of law which the hospital is alleged to have violated, and a general statement of the nature of the alleged violation;

- (2) the pleadings in the administrative proceeding; and
- (3) a final decision or order by the department.

You assert that all of the submitted documents were obtained or compiled by the department as a result of a complaint and investigation concerning a hospital. You also inform this office that the submitted information does not contain any information which falls within the exceptions to confidentiality listed in subsections (d) and (e) of section 241.051; therefore, you contend that all of the submitted information is confidential pursuant to section 245.051. We agree that most of the submitted documents are confidential pursuant to section 241.051 of the Health and Safety Code in conjunction with section 552.101 of the Government Code.

However, the A/N/E report is a report generated pursuant to chapter 48 of the Human Resources Code. Chapter 48 of the Human Resources Code governs investigations and protective services for elderly and disabled persons. Section 48.101 reads in part as follows:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

(1) a report of abuse, neglect, or exploitation made under ... chapter [48 of the Human Resources Code];

(2) the identity of the person making the report; and

(3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department or investigating state agency rule and applicable federal law.

Therefore, the A/N/E report must not be released to the public, except for a purpose consistent with chapter 48 of the Human Resources Code, or as provided by department rule or federal law. *See id.* § 48.101(b); *but see id.* § 48.101(c), (d), (e), (f) (permitting release of confidential information in certain circumstances).

Section 48.101 authorizes the adoption of rules for the release of information otherwise made confidential by the statute. Subsection (d) provides that “the investigating state agency by rule *shall* provide for the release on request [of otherwise confidential information] to a person who is the subject of a report of abuse, neglect, or exploitation or to that person’s legal representative[.]” Hum. Res. Code § 48.101(d) (emphasis added). The rules authorized by section 48.101 appear at section 1.207 of title 25 of the Administrative Code, which

relates to the confidentiality of information used or developed in the investigative process, including the resulting final report regarding abuse, neglect, or exploitation. Section 1.207(h) provides in part:

The completed investigative report regarding abuse, neglect, or exploitation of an elderly or disabled person shall be released to the subject of a report of abuse, neglect, or exploitation or to that person's legal representative upon request. Any information relating to the reporter's identity or any other individual whose safety or welfare may be endangered by the disclosure shall be blacked out or deidentified.

25 T.A.C. § 1.207(h). Here, the requestor represents a relative of the alleged victim, but there is no indication that the requestor represents the alleged victim herself, nor that the relative is the guardian of the alleged victim. Gov't Code §§ 552.023(d), .229, .307. Accordingly, the A/N/E report is also confidential. Because we find that section 48.101 of the Human Resources Code, in conjunction with section 1.207 of title 25 of the Administrative Code, governs access to the A/N/E report, we do not address your other arguments for its non-disclosure.

You explain that the department is the Medicare state survey agency pursuant to an agreement with the federal Health Care Financing Administration (HCFA), implementing the survey and certification provisions of the Medicare program. You assert that section 1306(a) of title 42 of the United States Code requires you to release certain "official reports," including "program validation survey reports and other formal evaluations of the performance of providers." You further state that these reports "are to be made public only after the provider has had a reasonable opportunity (not exceeding 60 days) to review the report and offer comments." Such official reports "shall not identify individual patients, individual health care practitioners, or other individuals." 42 U.S.C. § 1306(e), (f). You represent that HCFA Form 2567, a statement of deficiencies, is an "official report" that must be released in accordance with section 1306(e)(3) and (f). *See* 42 C.F.R. § 401.133(a) (statements of deficiencies and survey reports on providers of services prepared by state agencies made available to the public). Based on these representations and a review of the document, we conclude that HCFA form 2567 must be released according to section 1306(e)(3) and (f) of title 42 of the United States Code.

In summary, the department must withhold the submitted information as confidential pursuant to section 48.101 of the Human Resources Code, in conjunction with section 1.207 of title 25 of the Administrative Code, and section 241.051 of the Health and Safety Code, both in conjunction with section 552.101 of the Government Code. The department must promptly release deidentified documents constituting "official reports" after the hospital has been afforded the mandated review period. *See* 42 U.S.C. § 1306 (a), (e), (f).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous

determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Patricia Michels Anderson  
Assistant Attorney General  
Open Records Division

PMA/ljp

Ref: ID# 135273

Encl. Submitted documents

cc: Mr. Lonnie E. Chunn  
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(w/o enclosures)